

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

ALARIS HEALTH AT CASTLE HILL, Respondent,	Cases: 22-CA-125034 22-CA-125866 22-CA-140619
and	

1199 SEIU UNITED HEALTHCARE
WORKERS EAST,
Charging Party.

ALARIS HEALTH AT HARBORVIEW, Respondent,	Cases: 22-CA-125023 22-CA-125882 22-CA-140591
and	

1199 SEIU UNITED HEALTHCARE
WORKERS EAST,
Charging Party.

ALARIS HEALTH AT BOULEVARD EAST, Respondent,	Cases: 22-CA-125076 22-CA-125886 22-CA-131372 22-CA-140582
and	

1199 SEIU UNITED HEALTHCARE
WORKERS EAST,
Charging Party.

ALARIS HEALTH AT ROCHELLE PARK, Respondent,	Cases: 22-CA-124968 22-CA-125889 22-CA-140560
and	

1199 SEIU UNITED HEALTHCARE
WORKERS EAST,
Charging Party.

**RESPONDENTS' PETITION FOR RECONSIDERATION OF THE ADMINISTRATIVE
LAW JUDGE'S JUNE 19, 2015 ORDER GRANTING 1199 SEIU UNITED
HEALTHCARE WORKERS EAST'S PETITION TO REVOKE RESPONDENTS'
SUBPOENAS DUCES TECUM**

BACKGROUND

1199 SEIU United Healthcare Workers East (“1199 SEIU”) and Alaris Health at Castle Hill (formerly known as Castle Hill Healthcare Center, hereinafter referred to as “Castle Hill”) were parties to a collective bargaining agreement effective April 1, 2010 through March 31, 2014 (“2010-2014 CBA”). In April 2015, counsel for General Counsel of the National Labor Relations Board (“NLRB”) filed a Complaint against Castle Hill alleging various unfair labor practices.

Castle Hill denies most of the allegations. A hearing is scheduled to begin on June 23, 2015. In preparation for the hearing, on June 4, 2015, Castle Hill served a Subpoena Duces Tecum B-1-MTCLX9 on 1199 SEIU official Ron McCalla requesting documents related to the allegations in the Complaint (the “Subpoena”). The Subpoena specifically requested the following information covering the period of time from January 1, 2014 through the present:

1. Any and all documents in your possession regarding the negotiations between SEIU 1199 United Healthcare Workers East and Alaris Health at Castle Hill for the contract expiring March 31, 2014, including but not limited to:
 - a. Communications between You and Christina Ozual, Clauvice Saint Hilaire, Milly Silva or any other SEIU 1199 official;
 - b. Bargaining notes;
 - c. Contract proposals or counter-proposals;
 - d. Meeting minutes;
 - e. Memoranda;
 - f. Notices to rank and file;
 - g. Notes of meetings with rank and file; and
 - h. Communications with rank and file.
2. Any and all documents in your possession regarding a strike, threatened strike, or other concerted activity at Alaris Health at Castle Hill.

1199 SEIU petitioned to revoke the Subpoena. By Order dated June 19, 2015, the Administrative Law Judge (“ALJ”) granted 1199 SEIU’s petition. According to the ALJ’s Order, the documents sought in the Subpoena are relevant. Nonetheless, the ALJ found that the Subpoena’s request for 1199 SEIU’s “bargaining-related records . . . runs afoul of the privilege

traditionally applied by the Board to records reflecting communications between unions and their members.” The ALJ also found that the Subpoena’s request documents “relating to union or other protected concerted activity are outweighed by considerable interests of the affected employees in keeping their Section 7 activity confidential.”

Castle Hill files the instant Petition seeking reconsideration of the ALJ’s Order denying Castle Hill access to “the Union’s bargaining-related records” and “documents relating to union or other protected concerted activity,” including documents related to the strike at Castle Hill.¹ For the reasons stated herein, 1199 SEIU should be compelled to produce all of the information requested in the Subpoena that will help prove or disprove the allegations in the Complaint.

ARGUMENT

Courts “unhesitatingly refuse to enforce an order of an administrative board or agency, if issued pursuant to an unfair hearing or without due process of law. The requirements of fair trial and fair play is binding on administrative agencies as well as on courts.” *NLRB v. Newberry Lumber & Chem. Co.*, 123 F.2d 831, 838 (6th Cir. 1941). Castle Hill’s Subpoena requested documents that have a tendency to impeach or contradict the facts alleged in the Complaint. Denying Castle Hill access to such documents effectively denies Castle Hill the right to a fair trial because without production of relevant documents, Castle Hill has no way of obtaining evidence to prove or disprove 1199 SEIU’s allegations. Thus, Castle Hill is in the prejudicial position from which it cannot challenge the allegations against it. The arguments below are demonstrative.

¹ Castle Hill interprets 1199 SEIU’s Petition to Revoke and the ALJ’s June 19, 2015 Order as applying to Subpoena B-1-MTCLX9 served by Castle Hill on Ron McCalla only. To the extent the ALJ’s June 19, 2015 Order applies to the subpoenas served on Ron McCalla by Alaris Health at Rochelle Park, Alaris Health at Boulevard East, and Alaris Health at Harborview, or the subpoenas served by all four facilities on Clauvice Saint Hilaire, Milly Silva, Christina Ozual, and the custodians of records, this Petition for Reconsideration applies to those subpoenas as well.

I. Information Related to the Strike at Castle Hill Will Prove or Disprove the Motive Behind 1199 SEIU's Strike, Upon Which One of the Unfair Labor Practice Charges Turns.

Whether a strike is an unfair labor practice strike or an economic strike has significant effect on the rights and responsibilities of management and labor. *Pirelli Cable Corp. v. NLRB*, 141 F.3d 501, 515 (4th Cir. 1998). An economic strike is one that is not caused by an unfair labor practice. *Ibid.* Economic strikers need not be immediately returned to work, and they do not enjoy the right to displace replacement workers hired during a strike. *Ibid.* An unfair labor practice strike, on the other hand, is initiated in response to an unfair labor practice. *Ibid.* Unfair labor practice strikers are entitled to immediate reinstatement upon their unconditional offer to return to work or reinstatement with back pay. *Ibid.*

It is well settled that before a strike can be classified as an unfair labor practice strike, there must be evidence to support a causal connection between the unfair labor practice and the strike. *Id.* at 517-518. In other words,

There must be proof that an unfair labor practice was a contributing cause of the work stoppage. The mere fact that an unfair labor practice occurred before the strike is not sufficient proof of causation. There must be evidence that the strike was motivated by the employees' desire to vindicate their rights under the NLRA.

Ibid.

In analyzing a union's characterization of the purpose of the strike, an administrative law judge "must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context." *Id.* at 518. Rather, the totality of the evidence should be considered. In *Pirelli*, evidence in the form of a letter to the employees along with questions and answers about the strike, helped guide the discussion of how to classify the strike.

Here, the Complaint against Castle Hill alleges that “[f]rom about September 16, 2014 to about September 18, 2014, certain employees of Respondent represented by the Union and employed at Respondent’s Union City, New Jersey facility ceased to work concertedly and engaged in a strike.” Complaint ¶ 38. According to Paragraph 39 of the Complaint, “[t]he strike described above in paragraph 38 was caused by Respondent’s unfair labor practices.” The Complaint then alleges that on behalf of certain employees, 1199 SEIU made an unconditional offer to return to their former or substantially equivalent positions of employment, but that Castle Hill refused to reinstate them and “locked out its employees” in retaliation for supporting 1199 SEIU. Complaint ¶¶ 40-44. The Complaint further alleges that Castle Hill reduced the hours of employees because they engaged in concerted activities. Complaint ¶¶ 45-46.

Like the question and answer letters produced in *Pirelli Cable*, Castle Hill suspects 1199 SEIU here possess emails, letters, memoranda, surveys, notices, picket signs, and/or other documentation that states the reason for the strike at Castle Hill’s facility. The ALJ’s Order effectively denies Castle Hill access these documents under the theory that they reveal confidential bargaining strategy. But without production of those documents, how else will the ALJ be able to determine the true motivation behind the strike? How else will Castle Hill be able to defend itself against the Union’s claims? Precluding this information from production effectively permits 1199 SEIU to cherry-pick select documents that support its case and waive any privilege attached thereto, while concealing other documents that may hurt its case under the guise of a privilege. Simply, 1199 SEIU will have the power to disguise the true motives behind its actions.

Respectfully, the cases relied upon in the ALJ’s Order for the proposition that the Union’s rights to confidentiality outweigh Castle Hill’s rights to relevant information do not determine the outcome here. In *Berbiglia, Inc.*, 233 NLRB 1476, 1494-1495 (1977), the employer requested

documents that related almost exclusively to the Union's majority status, which was not at issue in the charges against the employer. Furthermore, the opinion in *Champ Corp.*, 291 NLRB 803, 818 (1988), noted that "[a]ll notes or memoranda found by the Union in response to the January 28, 1981 subpoena were appropriately turned over to Respondent." As demonstrated, such is not the case here; ALJ found these documents are relevant, yet Castle Hill is without recourse to access them.

As a final matter, 1199 SEIU names sixteen employees, by first and last name, who allegedly engaged in concerted activity. The Complaint alleges that Castle Hill locked those employees out, refused to reinstate them, and reduced their hours. Complaint ¶¶ 40-46. Allowing 1199 SEIU to conceal documents related to these claims is akin to concealing a disabled employee's medical records in an employment discrimination lawsuit. A defendant under those circumstances is without recourse. Without access to evidence related to the concerted activities in which the sixteen employees allegedly engaged, Castle Hill is unable to defend against the Union's claims.

In summary, because the veracity of the allegations in the Complaint turns on the evidence to support them, denying Castle Hill access to relevant information effectively denies Castle Hill a fair trial. Castle Hill's interest in these documents overwhelmingly outweighs any interest the Union arguably has in concealing them.

II. Disclosure of Bargaining Notes and the Other Subpoenaed Documents Is Necessary for Castle Hill to Prove or Disprove the Allegation that It Failed to Produce Documents and Meet With the Union.

For the same reasons stated above, Castle Hill is entitled to the Subpoenaed information. The Complaint alleges that Castle Hill failed to furnish the following information during the course of bargaining: the names of agencies it used to provide temporary staff; detailed invoices from

agencies used between January 1, 2013 and October 31, 2013; copies of work schedules for January through December 2013; the cost of health insurance for participating employees; and the nature of the insurance program, value of the plan, plan proposals, and costs. (Complaint ¶¶ 12-23 & Exhibits 1, 2.) The Complaint further alleges Castle Hill “failed and refused to bargain with the Union’s chosen collective-bargaining committee” on March 27, 2014 and April 28, 2014. The Subpoena requested information relevant to those claims.

To be sure, the existence and substance of contract proposals and counter proposals are part and parcel to the claims that Castle Hill refused to provide documents to 1199 SEIU during the course of negotiations and refused to meet with the Union to negotiate. The mere existence of such a document, or lack thereof, might prove or disprove those allegations. The substance of the proposals or counter proposals are also relevant to the documents requested and allegedly not provided by Castle Hill. Disclosure of communications between 1199 SEIU officials, bargaining notes, meeting minutes, and memoranda are necessary for the same reason. Bargaining notes or meeting minutes, for example, might disprove the Union’s allegation that the information Castle Hill provided 1199 SEIU was insufficient for the Union to formulate proposals. In that regard, those documents might demonstrate that the Union’s proposals themselves were illegal; or that Castle Hill already provided 1199 SEIU with all relevant documentation necessary for those proposals. There is no reason why such documents should be withheld from disclosure, as Castle Hill has no other means to obtain them.

SEIU 1199 claims the information requested in Paragraph 1 of the Subpoena are confidential or privileged because they reveal bargaining strategy. But not all of these documents necessarily contain confidential or privileged information. By way of example, an email between two 1199 SEIU regarding the Union’s unavailability to meet to bargain on dates proposed by Castle Hill

does not reveal bargaining strategy. Yet, it is probative to the issue of whether Castle Hill should be held responsible for any alleged failure of the parties to meet to bargain on March 27 or April 28, 2014. 1199 SEIU should be required to disclose non-privileged documents and create privilege log identifying documents it alleges are confidential and the basis for non-disclosure. *See generally CNN America, Inc.*, 352 NLRB 448 (2008).

III. Due Process Entitles Castle Hill to Documents Relating to the Allegation that Its Supervisors Allegedly Threatened, Interrogated, and Surveilled Employees.

The Complaint alleges that Castle Hill’s supervisors “told employees they should convince their co-workers not to strike”; “threatened to change employees’ work assignments and work schedules if they engaged in a strike”; “told employees they stabbed him in the back for convincing co-workers to engage in a strike”; “interrogated employees as to why they wished to go on strike”; “threatened employees with job loss if they engaged in a strike”; “interrogated employees as to why they wished to go on strike”; and “engaged in surveillance of employees who were engaged in union strike activities.” (Complaint ¶¶ 30-37.) For all of the reasons stated above, Castle Hill should be entitled to know the names of the employees who were allegedly threatened, interrogated, and surveilled; the circumstances under which they were allegedly threatened, interrogated, and surveilled; whether these employees filed grievances against the supervisors who allegedly engaged in this action; and whether they complained in writing to their Union representative about this purported behavior. Traditional notions of due process also entitles Castle Hill to this information. *Cf. NLRB v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 546 (7th Cir. 1987) (“The test of due process . . . is a determination of fair notice and [w]hether fair notice is given by way of pleading, or by way of the course of proceeding of a full litigation, the crucial focus is at

all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence.” (internal quotations omitted)).

CONCLUSION

1199 SEIU, not Castle Hill, put its bargaining-related records and other documents relating to the Union’s members and protected concerted activity at issue. Castle Hill respectfully requests that the ALJ reconsider its Order dated June 19, 2015, and compel 1199 SEIU to disclose any documents related to the allegations in the Complaint. Without access to those documents, Castle Hill is effectively denied the right to a fair trial.

Dated: June 22, 2015

Respectfully submitted,

JASINSKI, P.C.

By:

DAVID F. JASINSKI
Attorneys for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and accurate copy of the foregoing to be served on June 22, 2015 via electronic and regular mail upon:

Michael Silverstein, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place
5th floor
Newark, New Jersey 07102

William S. Massey
Gladstein, Reif & Meginnis, LLP
817 Broadway, Floor 6
New York, NY 10003

Dated: June 22, 2015



DAVID F. JASINSKI